STATE OF MICHIGAN

IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN

Plaintiff-Appellee

-vs-

CHRISTOPHER MCKAY

Defendant-Appellant.
_____/

Supreme Court No. _____

Court of Appeals No. 255596

Lower Court No. 03-2007-01

Wayne CRT
K. Worthy

WAYNE COUNTY PROSECUTOR

Attorney for Plaintiff-Appellee

_____

ANNE YANTUS (P 39445)
Attorney for Defendant-Appellant

_____

NOTICE OF HEARING

126930

DEFENDANT-APPELLANT'S APPLICATION FOR LEAVE TO APPEAL

PROOF OF SERVICE

9/28

STATE APPELLATE DEFENDER OFFICE

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TABLE OF CONTENTS

JUDGMENT APPEALED FROM AND RELIEF SOUGHT

Defendant-Appellant Christopher McKay moves for leave to appeal from the June 30, 2004, order of the Court of Appeals denying leave to appeal, and the August 24, 2004, order of the Court of Appeals denying his motion for reconsideration. He moves for leave to appeal and/or resentencing in light of the trial court's failure to offer meaningful allocution and the trial court's misscoring of Offense Variable 13 of the statutory sentencing guidelines.

Respectfully submitted,

STATE APPELLATE DEFENDER OFFICE

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Date: August 31, 2004

TABLE OF AUTHORITIES

CASES

CONSTITUTIONS, STATUTES, COURT RULES

STATEMENT OF QUESTIONS PRESENTED

I. WAS MR. MCKAY DENIED HIS RIGHT TO MEANINGFUL ALLOCUTION WHERE THE TRIAL JUDGE MADE UP HER MIND ABOUT THE SENTENCE BEFORE LISTENING TO EITHER MR. MCKAY OR THE PROSECUTOR?

Court of Appeals made no answer.

Defendant-Appellant answers, "Yes".

II. WAS MR. MCKAY DENIED HIS STATE AND FEDERAL DUE PROCESS RIGHT TO SENTENCING BASED UPON ACCURATE INFORMATION WHERE THE STATUTORY SENTENCING GUIDEILNES WERE MISSCORED UNDER OFFENSE VARIABLE 13?

Court of Appeals answers, "No".

Defendant-Appellant answers, "Yes".

STATEMENT OF MATERIAL PROCEEDINGS AND FACTS

Defendant-Appellant Christopher McKay pled no contest to bank robbery, MCL 750.531, as a fourth habitual offender, MCL 769.12, on May 5, 2003, in the Wayne County Circuit Court. On May 19, 2003, the Honorable Kym L. Worthy sentenced Mr. McKay to a term of nine (9) to fifteen (15) years imprisonment.

The plea bargain provided for dismissal of an unrelated bank robbery file, and the trial judge's assessment that she would likely impose a sentence of nine to fifteen years imprisonment under People v Cobbs, 443 Mich 276; 505 NW2d 208 (1993). The Cobbs evaluation was discussed over the course of several pre-trial hearing dates. The transcripts of the arraignment and final conference dates show that the parties and the trial judge were expecting a statutory sentencing guidelines range of 50 to 200 months (AT[1] 5, 13, FCT 8). The defense attorney argued at length about the positive factors in Mr. McKay's background, including family support, good work history, no weapon, no injuries to the victim, etc. (AT 7; FCT 8-9). The trial judge offered a proposed sentence of nine to fifteen years imprisonment at the time of arraignment (AT 16). Mr. McKay indicated that he was not interested in the offer (AT 16). At the final conference date, and after the defense attorney argued for a lower Cobbs evaluation, the trial judge indicated that she was not going to "revisit" the offer (FCT 7). No action was taken at that time.

Mr. McKay finally accepted the plea offer on May 5, 2003. At the conclusion of the plea hearing, however, the defense attorney stated that he intended to have several prominent members of the community write to the trial judge on Mr. McKay's behalf, and he hoped the

[1] AT refers to arraignment transcript; FCT refers to final conference transcript; PT refers to plea transcript; ST refers to sentence transcript; and PSI refers to presentence investigation report..

trial judge would possibly change her mind about the sentence (PT 12-13). The trial judge responded, "I would say that the chances are very very minimal, highly unlikely . . . But my mind is not closed, let's put [it] that way" (PT 13).

At sentencing, the defense attorney argued all of the positive factors in Mr. McKay's case (ST 7). He asked the court to consider a lower term (ST 7). The trial judge responded that she had just sentenced two individuals to prison for 10 to 15 years and 8 to 15 years, respectively, both for armed robbery with no prior record, and she thought the sentences were fair (ST 8). She compared Mr. McKay's criminal record (four prior felony convictions, on parole for armed robbery) and stated that the promised sentence of 9 to 15 years was a "lenient sentence" and "I'm not going any lower" (ST 10). She repeated, "I'm not changing the sentence. I think it's more than fair, too lenient" (ST 10). She then offered allocution to the prosecutor and Mr. McKay (ST 10-11).

The instant offense involved a robbery of a bank on January 24, 2003. Mr. McKay handed a note to the teller that referred to "$100's and $50's" (PSI p.2). He held his hand in his pocket as if he had a gun (PSI p. 2) He said something to the effect of "Don't play, now, now" (PT 11), or "You see it don't play" (PSI p.2). The teller handed over the money and Mr. McKay was arrested a short time later (PSI p. 2).

The Court of Appeals denied leave to appeal on June 30, 2004 (Order, Appendix A). The Court of Appeals denied rehearing on August 24, 2004 (Order, Appendix B).[2]

Mr. McKay now moves for leave to appeal.

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[2] Defendant has not renewed his arguments under Blakely v Washington, 542 US ___ (2004), at this juncture given that his sentence falls within the revised Blakely range of 29 to 114 months (excluding the scoring of points under Offense Variables 9 and13).

I. MR. MCKAY WAS DENIED HIS RIGHT TO MEANINGFUL ALLOCUTION WHERE THE TRIAL JUDGE MADE UP HER MIND ABOUT THE SENTENCE BEFORE LISTENING TO EITHER MR. MCKAY OR THE PROSECUTOR.

Defendant is aware of no specific requirement that a defendant object to the trial court's failure to offer allocution at sentencing, and the Michigan Supreme Court has many times addressed allocution errors without objection. *See e.g.,* People v Petit, 466 Mich 624; 648 NW2d 193 (2002). *Cf.*, People v Jones (On Rehearing), 201 Mich 449, 452; 506 NW2d 541 (1993) (defendant did not object to being place under oath before allocution, but error reviewed because of constitutional implications). There is no requirement that a defendant object to the length of his or her sentence in the trial court. People v Cain, 238 Mich App 95, 129; 605 NW2d 28 (1999). *See also*, People v Kimble, ___ Mich ___; ___ NW2d ___ (SC# 122271, reld' 6/29/04), slip op. at 6 (no requirement that defendant object to departure from guidelines at time of sentencing).

Questions pertaining to allocution present an issue of court rule interpretation that is subject to de no review. People v Petit, 466 Mich at 627.

In Mr. McKay's case, there was a Cobbs evaluation for a sentence of nine to fifteen years imprisonment (PT 4). Defense counsel argued strenuously for a lower sentence at the time of the Cobbs evaluation, the plea hearing and at sentencing (AR 7; FCT 7-9, 12-13; PT 12-13; ST 7). The trial judge responded that the "chances are very very minimal, highly unlikely [for a lower sentence] . . . But my mind is not closed, let's put [it] that way" (PT 13).

At sentencing, and after hearing from defense counsel, the trial judge stated that she would not impose a lower sentence, it was a fair sentence, and she was not changing the sentence:

> [THE COURT:] Now maybe if you look at it that way, maybe you won't understand me because you're the one that has to serve time, I don't know, but I'm not going any lower than I already have in this case. I have given you consideration because I've understood from the very beginning that you have had a good family support and good community support despite what you've done in the past. That's fine. That's great. Maybe you would have done more if it had not been for the support you received from your wife, your mother, your grandmother, and other community members.
>
> This is a very lenient sentence. I don't know if you know anything about me, this is a lenient sentence and I'm not going any lower. It's exceedingly fair, it's more than fair.
>
> So, I appreciate everything that you wife said. I did read her letter. The bottom line is she identified your main problem is being one of drugs and she detailed some of your progress that you've made and I'm glad that you have had support. But not to be too much more repetitive, I'm not changing the sentence. I think it's more than fair, too lenient. [ST 10.]

The trial judge *then* offered allocution to Mr. McKay and the prosecutor (ST 10-12). Mr. McKay initially declined, but then responded that "I just want the Court to acknowledge that, you know, I don't point my fingers at anyone as far as my crime is concerned. I'm responsible for my own actions and I'll accept that responsibility . . ." (ST 12).

The sentencing judge cannot make a final decision concerning the sentence without first hearing from the parties and the defendant. *See*, MCR 6.425(D)(2)(c). To do otherwise denies the right of meaningful allocution. People v McNeal, 150 Mich App 85; 389 NW2d 708 (1985). The Court of Appeals reversed in McNeal where the trial judge stated before the resentencing hearing that the sentence would not change. "To afford the defendant an opportunity to speak after the court, in effect, announces it has no intention of changing the sentence renders the allocution meaningless." 150 Mich App at 90.

The Supreme Court acknowledge it its very decision in People v Cobbs, supra at 283, that "A judge's candid statement of how a case appears at an early stage of the proceedings does not

prevent the judge from deciding the case in a fair and evenhanded manner later, when additional facts become known." The Court noted in particular that its decision allowing judicial plea bargaining did not infringe on the prosecutor's rights because "this procedure [does not] limit the prosecutor's right to introduce additional facts at appropriate points during the remaining pendency of the case, such as during allocution at sentencing." 443 Mich at 284.

A defendant's right of allocution at sentencing is valuable as well, and it has a long and honored history. Green v United States, 365 US 301; 81 S Ct 653; 5 L Ed 2d 670 (1961).

A defendant must be offered the opportunity to allocute *before* the sentence is decided. People v Brooks, 122 Mich App 39, 42-43; 329 NW2d 524 (1982). Here, the trial court failed to keep an open mind and instead decided the sentence before allocution of either Mr. McKay or the prosecutor. Mr. McKay, at a minimum, was denied his right to meaningful allocution. People v McNeal, supra. He is accordingly entitled to resentencing.

II. MR. MCKAY WAS DENIED HIS STATE AND FEDERAL DUE PROCESS RIGHT TO SENTENCING BASED UPON ACCURATE INFORMATION WHERE THE STATUTORY SENTENCING GUIDEILNES WERE MISSCORED UNDER OFFENSE VARIABLE 13.

Defense counsel objected to the scoring of Offense Variable 13 of the statutory sentencing guidelines at the time of sentencing (ST 5-6). The challenge is therefore preserved for appeal. People v McGuffey, 251 Mich App 155; 649 NW2d 801 (2002), lv den 468 Mich 859 (2003).

Application of the statutory sentencing guidelines presents a question of law that is reviewed de novo by this Court. People v Libbett, 251 Mich App 353; 365; 650 NW2d 407 (2002). A preserved challenge to the scoring of the sentencing guidelines is reviewed for clear error. People v Hicks, 259 Mich App 518, 522; 675 NW2d 599 (2003). Scoring decisions under the sentencing guidelines are not clearly erroneous if there is any evidence to support the scoring. People v Witherspoon, 257 Mich App 329, 335; 670 NW2d 434 (2003).

At sentencing, defense counsel disagreed with the prosecutor's proposed scoring of twenty-five points under Offense Variable 13 based on three armed robbery convictions from 1990:

> MS. DAWSON: Well, is he should get – is he scored – offense variable number 13, your Honor, he should get 25 points for this being a continuing pattern of criminal behavior involving crimes against a person.
>
> THE COURT: Mr. Plumpe.
>
> MR. PLUMPE: Don't agree. That's certainly arguable. We have here A, bank robbery [the instant offense] which I guess is a crime against a person but the other convictions are quite a ways distance away. So how many years makes a pattern, I don't know. I would say that –

THE COURT: Well, the problem that you have, Mr. Plumpe, and we've addressed this in the past and that is that he's on parole right now.

MR. PLUMPE: I understand that.

THE COURT: For the armed robbery [convictions] and so there's still a connection in terms of time.

MR. PLUMPE: Because he's on parole but that parole started years after the armed robbery. That's all I'm saying.

THE COURT: I understand what you're saying but he is still on parole so he's still serving that sentence.

MR. PLUMPE: True. I think the Court has to make a call on that.

THE COURT: Offense variable 13.

MS. DAWSON: 25 points, your Honor. That's how I got to my initial score of 50 to 100 on the conviction the conviction and 50 to 200 on –

THE COURT: The habitual is being dismissed.

MS. DAWSON: No, he pled as charged, your Honor, the habitual is not dismissed. [ST 5-6.]

Although not entirely clear from the above passage, the trial judge was relying on three armed robbery convictions in 1990 for which Mr. McKay was on parole at the time of the instant offense (PSI coverpage, PSI pp. 3-4). The presentence report lists no other felony convictions, and certainly no other felony convictions against a person (although there was discussion at the time of the plea hearing and at sentencing of two prior felony convictions that were not listed in the presentence report, one for drugs in 1984, and one for larceny in a building (which may have been a misdemeanor) in 1987, although obviously neither is a crime against the person) (ST). There was likewise nothing in the presentence report about other uncharged crimes, dismissed charges, or other criminal activity.

In other words, the instant offense (a bank robbery), which occurred on January 24, 2003, was considered to be "part of a pattern of criminal activity involving 3 or more crimes against a person," MCL 777.43, because the trial court found that it was sufficiently connected to the parole term for the 1990 armed robbery convictions.[3]

The trial court clearly erred. The trial judge was applying a version of the "ten-year rule" to the scoring of OV 13, but the ten year rule (which considers a defendant's continuing connection to the crime justice system) applies only to the scoring of the prior record variables. MCL 777.50 ("In scoring prior record variables 1 to 5, do not use any conviction or juvenile adjudication that precedes a period of 10 or more years . . ..").

The wording of Offense Variable 13 literally provides that "all crimes within a five-year period, including the sentencing offense, shall be counted regardless of whether the offense resulted in conviction." MCL 777.43(2)9a). And 25 points is appropriate when "the offense was part of a pattern of felonious criminal activity involved 3 or more crimes against a person." 777.43(1)(a).

Mr. McKay meets neither of the above requirements. While the instant offense is concededly a crime against the person, it did not occur within five years of any two other crimes against a person. The 1990 armed robbery convictions occurred thirteen years before the instant matter.

Defendant would take a moment to disagree with the split decision of the Court of Appeals in People v McDaniel, 256 Mich App 165; 662 NW2d 101 (2003). In McDaniel, two judges held that "any" five year period will suffice and the period need not including the

[3] There was another bank robbery case that was dismissed as part of the instant plea bargain (PT 3), but Mr. McKay denied guilt for this offense at sentencing and the trial judge indicated that she would not consider it (ST 11). In any event, this would constitute at best a *second* crime against a person within five years.

sentencing offense. The case was appealed and this Court and held in abeyance, People v McDaniel, 668 NW2d 909 (2003). Defendant would note that the McDaniel holding is contrary to the plain language of the statute as explained by the Honorable Pat M. Donofrio in his dissent in People v McDaniel, supra. Defendant disagrees that a trial judge can consider three armed robbery convictions from 1990 as a distinct "pattern" of criminal behavior under OV 13 for purposes of a 2003 armed robbery offense. The sentencing offense must be considered for purposes of the five-year period under OV 13.

Correctly scored, the sentencing guidelines should have reflected zero points under OV 13 (there were no other verified felonies within at last six years of the instant offense) and a recommended range of 36 to 142 months. MCL 777.64 (Class C grids) (SIR, Appendix C).

While the trial judge's nine-year minimum term falls within the corrected range, Defendant would note that he argued strenuously for a lesser term throughout this case and nothing precluded the trial judge from imposing a lower sentence at the time of sentencing. People v Cobbs, 443 Mich 276, 283; 505 NW2d 208 (1993).

Given the due process right to sentencing based upon accurate information, Townsend v Burke, 334 US 736; 68 S Ct 1252; 92 L Ed 1690 (1948); People v Malkowski, 385 Mich 244; 188 NW2d 559 (1971); US Const Amends V & XIV; Const 1963, art 1, sec 17, Mr. McKay is entitled to resentencing.